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IN THE
SUPREME COURT OF THE UNITED STATES
October term, 1980

MICHAEL LOCHIATTO, CHERYL ROGERS A/K/A CHERYL LONG, PAUL GIRDLEY, WILLIAM THAYME, ANTHONY BATTISTA,

Petitioners,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

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QUESTIONS PRESENTED

I.

WHETHER THE PETITIONERS HAVE ESTABLISHED THAT THIS COURT SHOULD ASSUME JURISDICTION OVER THE INSTANT CASE ON THEIR CLAIM THAT THE FLORIDA OBSCENITY STATUTE AS CONSTRUED BY THE STATE SUPREME COURT IS UNCONSTITUTIONAL AND IN CONFLICT WITH MILLER v. CALIFORNIA, 413 U.S. 15 (1973)?

II.

WHETHER THE PETITIONERS HAVE SHOWN THE STATE COURTS FAILED TO REQUIRE THE RESPONDENT TO ESTABLISH SCIENTER IN ITS PROSECUTION OF THEM FOR PROMOTING AND DISTRIBUTING OBSCENE MATERIAL, CONTRARY TO CONTROLLING PRECEDENT?

III.

WHETHER THE PETITIONERS HAVE ESTABLISHED THAT THIS COURT SHOULD EXERCISE ITS JURISDICTION TO REVIEW THEIR CONTENTION THAT THEIR RIGHTS WERE VIOLATED BY A SEARCH AND SEIZURE CONDUCTED PURSUANT TO A WARRANT, PARTICULARILY SINCE: (a) THE CHALLENGE TO THE SEIZURE OF THE THREE HUNDRED FILMS WAS NOT MADE BELOW; and (b) THE ONLY PETITIONER TO SHOW STANDING WAS LOCHIATTO?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions cited by the Petitioners, Respondent submits:

Fla.Stat.847.07(c). Considered as a whole and applying community standards, material is obscene if:

(1) Its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion;

(b) It is utterly without redeeming social value, and

(c) In addition, it goes substantially beyond customary limits of candor in describing or representing such matters.

STATEMENT OF THE CASE

Respondent accepts the Petitioners' statement of the case subject to the following corrections:

The record on appeal filed in the State appellate court reflects that only Petitioners Lochiatto and Rogers a/k/a Long filed motions to dismiss which challenged the constitutionality of Fla.Stat.847.07 (R 1782-1783; 1787-1789; 1794-1797). Therefore, by failing to raise the issue in the trial court, the other Petitioners waived their right to challenge the constitutionality of the statute on appeal. Shifrin v.State, 210 So. 2d 18 (3rd DCA Fla. 1968); Crossley v. State, 200 So. 2d 640 (2nd DCA Fla. 1967). The Respondent pointed this out in its

Brief of Appellee filed in the Fourth District Court of Appeal (Appellee's brief, page 9, ¶1.)

The matter of the seizure of the three hundred (300) additional films from the warehouse was not, contrary to Petitioners' statement, raised in the Petitioners' pretrial motions to suppress, which challenged only the adequacy of the search warrant and underlying affidavit (R 1825-1829). In fact, the seizure of the three hundred (300) films was consented to by Joseph Cassaro, a trial defendant who was not a party to the appeal, and who was the only defendant present when the warrant was executed. The Petitioners never contested the validity of the seizure of these films in the Courts below, at

either the trial or appellate level. (See Respondent's Appendices A and B; Initial Brief of Appellant, Point III). Additionally, the Respondent challenged the Petitioners' standing to contest the search of the warehouse in the lower courts, arguing that only Petitioner Lochiatto, as lessee of the premises, could claim a Fourth Amendment interest (Appellee's brief pp. 21-23). The Petitioners relied on the automatic standing rule of Jones v. United States, 362 U.S. 257 (1960). (Initial brief of Appellants' pp. 22-23).

ARGUMENT AGAINST GRANTING THE WRIT

I.
THE DEFINITION OF OBSCENITY SET FORTH IN FLA.STAT.847.07, AS AUTHORITATIVELY CONSTRUED BY THE FLORIDA SUPREME COURT, IS CONSTITUTIONAL AND CONSISTENT WITH THE STANDARDS SET BY THIS COURT.

The Petitioners contend that Fla. Stat. 847.07 is over broad and in contravention of the obscenity standards announced by the United States Supreme Court in Miller v. California, 413 U.S. 15 (1973). The "Miller test" of obsenity is three pronged: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to prurient interest; (b) whether the work describes or deplicts in a patently offensive way, sexual conduct specifically

defined by the applicable state law; (c) whether the work, taken as a whole lacks serious literary, artistic, political or scientific value. The Florida Supreme Court, in State v. Aiuppa, 298 So. 2d 391 (Fla. 1974) authoritatively construed Fla.Stat.847.07 and found it met the Miller test, noting that the Florida Statute is substantially the same as the Georgia Statute in Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973) which was construed and upheld by the Georgia Supreme Court on remand, State v. Paris Adult Theatre,201 S.E. 2d 456, 231 Ga.312(1973). The Florida Supreme Court subsequently held in First Amendment Foundation of Fla.Inc. v. State,364 So. 2d 450 (Fla. 1978) that the statute as construed in Aiuppa

is authoritative and it does meet the Miller test. These two decisions (Aiuppa and First Amendment Foundation) were reaffirmed in M.B.F. Theatres, Inc. v. State, 368 So. 2d 347 (Fla. 1979).

This construction of the Statute by the Florida Supreme Court was not an improper usurpation of the legislative function, as the Petitioners suggest. In its Aiuppa opinion, the Court noted its responsibility to resolve doubts as to the constitutionality of a statute in favor of its validity, and held that since it was clear the legislative intent was to regulate the depiction or description of sexual conduct, the Court considered it was not rewriting the statute, but reasonably construing it, consistent with the

legislative intent. See 298 So. 2d at 396-397. This judicial construction was authorized by the Miller v. California opinion, which specifically provided that judicial construction of a statute may be considered with the statute to determine its constitutionality:

> [States can regulate] works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. 413 U.S. at 24 (Emphasis supplied).

Therefore, the Florida Supreme Court's construction of Fla.Stat.847.07 was clecrly permitted by the Miller decision.

The Florida obscenity statute, as construed in State v. Aiuppa, supra, was sufficient to put the Petitioners

on notice as to what conduct was prohibited. The indictments in the instant case specified the nature of the material distributed by the Petitioners:

> Said films graphically depict and show patently offensive "hard core" pornographic repredentations of ultimate sexual acts or physical conduct, normal or perverted, actual or simulated, to wit: nude and semi nude male and female persons actually engaging in sexual conduct, including sexual intercourse, sodomy, cunnilligus, and fellatio. . . (R 1780; 1784-1785).

This material is the type that is specifically prohibited by the statute as construed in State v. Aiuppa, supra. Thus, the prohibited conduct is sufficently described, the Petitioners' material came within that description, and so the claim that the statute is unconstitutionaly vague is without merit.

The Florida Supreme Court's construction of the State obscenity statute was proper and clearly consistent with the opinions of this Court. Miller v. California, supra, 413 U.S. at 24; Ward v. Illinois, 431 U.S. 767 (1977). Therefore, the application of this statute to the Petitioners was constitutionally permissible and in affirming their convictions, the Court of Appeal did not create confict with prior decisions of this Honorable Court.

II.

THIS COURT'S REQUIREMENT THAT THE GOVERNMENT ESTABLISH SCIENTER IN A PROSECUTION FOR PROMOTING AND DISTRIBUTING OBSCENE MATERIAL IS FOLLOWED IN FLORIDA AND SUCH EVIDENCE WAS PRESENTED IN THE PETITIONERS' TRIAL.

The United States Supreme Court held in Smith v. California, 361 U.S. 147 (1959) that obscenity statutes must contain an element of scienter because a "strict liability" standard in such statutes would work as a substantial restriction of freedom of the press. Although declining to give a specific definition, the Court did note that scienter could be proved by circumstantial evidence: "the circumstances may warrant the inference that [a defendant] was aware of what a book contained, despite his denial" 361 U.S. at 154. The Court subsequently held in Hamling v.

United States, 418 U.S. 87 (1974), that it is constitutionally sufficient for the prosecutor to show that a defendant had knowledge of the contents of the materials and knew the nature and character of the materials.

The requirement of scienter is incorporated into the Florida Statutes, which specifically require that the person charged "know [ ] the obscene nature" of the materials he distributed, Fla. Stat. 847.07(1), and that he "knowingly" promoted "obscene matter". Fla. Stat. 847.07(4)(c). The Florida Appellate Courts' decisions in this area are likewise consistent with those of the United States Supreme Court. For example, in Cohen v. State, 125 So. 2d 590 (Fla.1961), the Court held that the prosecutor must prove an accused had knowledge of the

obscene character of the documents or articles involved.

In their Petition, as they did in the Court of Appeal, the Petitioners make broad assertion that the State failedto prove scienter without discussing the evidence presented at their trial. On the contrary, the State adduced extensive evidence at trial showing the general nature of the enterprise the Petitioners were involved in, as well as evidence pertaining to each Petitioner individually. This evidence was discussed in the Respondent's Answer Brief on direct appeal and clearly accepted as sufficient by the State Appellate Court. (Answer brief of Appellee, pp.15-19). Suffice it to say that the State established the Petitioners were individually

and collectively involved in the business of promoting and distributing obscene films and they were clearly aware of the nature and contents of their stock in trade. The evidence was similar to the type found sufficient by this Court in Mishkin v. New York, 383 U.S. 502 (1966).

Therefore, in affirming the Petitioners' convictions, the State Court of Appeal applied the proper standard and did not create confict with the decisions of this Court.

III.

THE TRIAL COURT'S DENIAL OF THE PETITIONERS' MOTIONS TO SUPPRESS EVIDENCE OBTAINED PURSUANT TO A VALID SEARCH WARRANT AND THE STATE APPELLATE COURT'S AFFIRMANCE THEREOF WERE CONSISTENT WITH ESTABLISHED PRECEDENT.

The Petitioner's contention that the seizure of three hundred films(300) during the search of a warehouse was an unconstitutional prior restraint was never argued in the Courts below.The Petitioners were told at the Motion to Suppress hearing that the three hundred films would not be introduced at their trial, but would be referred to by type (Appendix A). At trial, it was established that the films were seized

pursuant to the consent[1] of a trial defendant who was present when the warrant was executed, and defense counsel agreed that the films would be referred to as "sexually explicit" (Exhibit B). These films were not introduced at trial, and the reference to their nature was for purposes of showing scienter. Having made no objection to the constitutionality of the seizure of these films in the State courts, the Petitioners are estopped from raising one now, for the Rules of this Court, Rule 21(1)(h), clearly require that the federal question must have been timely and pro-

(1) Which is a recognized exception to the Fourth Amendment warrant requirement, e.g., Katz v. United States, 389 U.S. 347, n.22 (1967), and probably explains the lack of objection below.

perly raised in the State court system in order to give this Court certiorari jurisdiction. Therefore, Petitioners' argument at pages 20 -22 of the Petition concerning the three hundred films must be disregarded.

Furthermore, the Petitioners, with the exception of Petitioner Lochiatto who was a lessee of the premises, do not have standing to object to the search. The automatic standing rule of Jones v. United States, 362 U.S. 256 (1960), relied on by the Petitioners below, has, in the interim been abolished by this Court's decision in United States v. Salvucci, __ U.S. __, 65 L.Ed. 2d 619 (1980). Florida has since recognized and applied the Salvucci decision. See e.g.,State v. Muzevsky, 388 So. 2d 21

(4th DCA Fla. 1980). There was no evidence that any of the Petitioners other than Lochiatto had a privacy interests in the premises searched, a warehouse. None of them were present at the time of the search, and although they distributed materials obtained from the business, Spectrum Design, only Petitioner Battista asserted any proprietary interest in the business (R 1809). Therefore, the Petitioners' Fourth Amendment rights were not impinged by the search so they lacked standing to challenge its validity. Compare, United States v. Torch, 609 F. 2d 1088 (4th Cir. 1979).

Even if the Petitioners had standing, their attack on the search warrant is without merit, and thus the Court of

Appeal properly affirmed the trial court's denial of the Motions to Suppress. The affidavit underlying the search warrant was sufficient to present probable cause upon which the Magistrate could determine that the films "Emergency Nurse" and "Venture in Bizarre" were obscene. The affidavit included as an attached exhibit an "Order of Determination of Probable Cause of Obscenity" signed by Circuit Judge John Moore. This order stated that the Judge had received the affidavit of Robert Rigia (a police detective) and upon reviewing it, found probable cause to believe the films were obscene under the purview of Chapter 847 of the Florida Statutes (SR). The Rigia affidavit contained a scene-by-scene description of the films' con-

tents, and this fact was stated in the probable cause affidavit (SR).

This Court has held that an applicant for a search warrant does not have to have direct knowledge of all the facts alleged, and may include reliable hearsay information in his affidavit. Spinelli v. United States, 393 U.S. 410 (1969). The information pertaining to the films' obscenity in the instant case- a judicial order finding probable cause to believe the films were obscene based on a written scene-by-scene description of the films supplied by a police officer who had viewed them- was certainly reliable. The procedure of a magistrate reviewing a police affidavit describing films and finding probable cause that they are obscene has been specifically

approved in lower federal courts. United States v. Middleton, 599 F. 2d 1349 (5th Cir. 1979); Ellwest Stereo Theatres Inc. v. Nichols, 403 F. Supp. 857 (M.D.Fla. 1975).

The Petitioners' other objection to the warrant is that it allegedly did not state with sufficient particularity the items to be seized because in addition to the films "Emergency Nurse" and "Venture in Bizarre", the police were directed to seize "all books and records which are evidence of the violation of Fla.Stat.Section 897.07(4)(c)". The Respondent maintains the language was sufficient because the statute cited prohibits wholesale promotion of obscene matter. Wholesale promotion is defined in the statute as follows:

> to manufacture, issue, sell, provide, deliver, transfer, transmute, publish, distribute, circulate, disseminate, or offer or agree to do the same with or without consideration, for purposes of resale or redistribution.

Clearly then, the warrant was describing the business records that would show the Petitioners were involved in wholesale promotion of obscenity. Business records of this type aren't entitled to the same First Amendment consideration as the obscene material itself. United States v. Torch, 609 F. 2d 1088 (4th Cir. 1979); Stanford v. Texas, 379 U.S. 476, 485 n.16 (1965). Accordingly, the generic description was sufficient. Thus, the Petitioners have failed to establish that their constitutional claims were incorrectly ruled on by the State courts. The affirmance of the trial

court's denial of their Motions to Suppress by the State Appellate Court was consistent with constitutional principles and the decisions of this Honorable Court.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited therein, Respondent respectfully requests that this Court DECLINE to assume jurisdiction in this case and DENY the Petitioners' Application for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief in Opposition to Petition for a Writ of Certiorari has been furnished this ____ day of September, 1980, to ROBERT EUGENE SMITH, ESQ., Counsel for Petitioners, 16133 - Ventura Boulevard, Penthouse E, Encino, California 91436, by U.S. Mail.

Of Counsel

APPENDIX "A"

EXCERPT FROM TRIAL COURT HEARING ON THE DEFENSE MOTION TO SUPPRESS, HELD DECEMBER 2, 1977.

[DEFENSE COUNSEL]:
Judge, while we're all gathered together, maybe we can address ourselves to another point. At the time of the search at the warehouse there was obtained approximately 300 additional films under circumstances which Mr. Vinikoor and I probably would not agree as to the legal effects.

The question then is presented does Mr. Vinikoor intend to introduce those 300 hour long films in the trial of this case, and if so, of course, for whatever reason we want to be able to address ourselves by memorandum prior to trial to anticipate these problems so that the Court can rule on them.

[THE COURT]:
What are you planning on doing?

[PROSECUTOR]:
That's a tough question. The State at this time does not intend to introduce into evidence the other films. However, the

State does anticipate making reference to the number of films found at that location.

[DEFENSE COUNSEL]:
We would have less difficulty with that, Your Honor.

[THE COURT]:
All right, then we shouldn't have any problems.

[PROSECUTOR]:
I certainly don't anticipate. If the State changes its position with regard to the introduction of evidence, counsel will be given adequate notice that they can make the appropriate motions to the Court.

[DEFENSE COUNSEL]:
Upon the response to discovery where indicated the evidence to be used, you've said sixteen millimeter film and eight millimeter film. The eight millimeter films would be films of surveillance.

[PROSECUTOR]:
That's correct. There are no suspected pornographic films that are part of this case.

[DEFENSE COUNSEL]:
They're all pornographic.
They're not all obscene.

[PROSECUTOR]:
Can I approach you on that, counsel?

[THE COURT]:
Are the only films that you're talking about this Emergency Nurse thing and the Bizarre?

[PROSECUTOR]:
That's correct. Those are the two films named in the indictment that the State intends to use.

[DEFENSE COUNSEL]:
When I make reference to the films.- - -

[PROSECUTOR]:
Well, try not to use the words obscene. There will be reference to the explicitness of the films.

[DEFENSE COUNSEL]:
That's a different story then.

[PROSECUTOR]:
So if that presents a problem, you are now put on notice that's the State intention and you may file whatever motions you wish.

[DEFENSE COUNSEL]:
That's not a problem.

[THE COURT]:
"Exceptionally explicit" will be the terminology.

(R 20-22).

A P P E N D I X "B"

EXCERPT OF TRIAL TESTIMONY OF INVESTIGATOR HOLLOWAY HELD MARCH 2, 1978.

Q [BY PROSECUTOR]: Now, Mr. Holloway, would you tell the jury, please, how many films you removed from the warehouse pursuant to the search warrant?

A. Two.

Q. And did you remove films other than those two films from the warehouse on July 26th?

A. Yes.

Q. Was that pursuant to the consent of Mr. Cassaro [a co-defendant at trial who was not one of the Appellants below] as you testified earlier?

A. Yes, it was.

Q. How many films did you remove from the warehouse pursuant to Mr. Cassaro's consent?

A. Approximately three hundred.

Q. And were all of these films sixteen millimeter film or were they different?

A. No, there were some sixteen millimeter full length film, some thirty five millimeter full length film. There were utitled films. There were some what they call "Trailers" which are coming attractions of other films.

Q. Did you have an opportunity to personally view any of the films that were taken on that day?

A. Yes, I did.

Q. Of the ones that you personally viewed, how many esplicitly depicted sexual acts?

[DEFENSE COUNSEL]:
Objection, Your Honor.

I think we've discussed this matter at some length and I think that Mr. Vinikoor is going beyond what I understood Your Honor's ruling to be.

Further, Your Honor, this witness isn't qualified to testify about some films that are not in evidence, whatever the contents of those films are.

[THE COURT]:
I honestly don't remember. Come on up.

(Thereupon, the following proceedings were had outside the hearing of the jury:)

[THE COURT]:
I thought we stipulated to it.

[PROSECUTOR]:
Judge, the memory of defense counsel is phenomenally short lived.

[THE COURT]:
I thought --

[PROSECUTOR]:
Not only did they stipulate to it but they agreed so long as I used the language "sexually explicit". We agreed way back on the Motion to Suppress.

[THE COURT]:
That was my understanding.

[DEFENSE COUNSEL]:
I am not arguing.

[PROSECUTOR]:
It's always the same two that are arguing.

[THE COURT]:
That's what I thought. I really did. Was I mistaken?

[DEFENSE COUNSEL]
Your Honor, we had previous discussions today concerning the films that were seized and the films that were taken and how we were going to relate to this and the Court indicated that we would--there were films I agreed that there was a consent for the taking of films. That's all I agreed to. Now, he's asking this witness how many of the films viewed contained sexually explicit acts. That calls for a conclusion from this witness. The only way that we can introduce that is through the films.

[THE COURT]:
He can describe what the sexual acts--

[DEFENSE COUNSEL]:
We're talking about best evidence, Your Honor, day in and day out and the best evidence is the films.

[THE COURT]:
We could either have him describe what was in the films or we can have him refer to it as having sexual content or sexually explicit whatever. You decide to do one of those things. You have to pick.

[DEFENSE COUNSEL]:
We object to that, putting us in that position but obviously if we have to choose one or the other, we'll agree to sexually explicit. However, I think that he's not qualified to testify to that.

[THE COURT]:
If you'd rather, we can go back and have him describe the sexual acts but it was my understanding we had agreed this would be the verbiage used.

[DEFENSE COUNSEL]:
As long as the record reflect my objection that the films speak for themselves and the best evidence are those films. They are not the films that are charged in this indictment, that any discussion of those films is completely irrelevant to this case, and, number two any of those descriptions of those films, by the way, is not proper because it's not the best evidence; as long as my objection is noted.

[THE COURT]:
Okay, go ahead. The language preferred is sexually explicit.

[THE PROSECUTOR]:
The question was proper.

(Thereupon, the following proceedings were resumed in the hearing of the jury:)

Q. I repeat the question, Mr. Holloway, how many of the films that you saw explicitly depicted sexual acts.

A. All of them.

(R 308-311).